89-627

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

Carmen R. Stanfield, Petitioner,

v.

Betty W. Horn,
Charles W. Burson,
Lowry F. Kline, and
H. Lee Barfield, II, Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Carmen R. Stanfield, B.A., J.D.
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166 pp

QUESTIONS PRESENTED

1. In the complete absence of any factual contact such as a formal legal letter, or a formal legal petition, or an informal hearing, or a formal proceeding between the petitioner and any judge or judges on the bench of the Tennessee Supreme Court and when under color of §§ 13.02(a) and 14.04 of Tennessee Supreme Court Rule 7 as well as the respondents' policies and practices in the administration of the aforementioned two sections of Tennessee Supreme Court Rule 7 the respondents committed a proved fraud against the petitioner in violation of the petitioner's federally protected rights during the administration of the test scores on the February, 1987, Tennessee bar examination, did the test score fraud committed by the respondents against the petitioner mean "a final

state court decision" within the meaning of the decision of the United States Supreme Court in the Feldman case, and if not, did the district court have subject-matter jurisdiction over the petitioner's case?

2. Contrary to the original decision of the United States Supreme Court establishing a case law securing the rights of the petitioner and all similarly situated citizens of the United States in the exercise of its constitutional appellate jurisdiction over the Feldman case, emanating from the Prentis case, followed by the Tenth Circuit Court of Appeals in the Doe case, and followed by the United States District Court for the Western District of Tennessee in the unreported Hampton case in keeping with the judicial practice of stare decisis, does physically changing the original form and

meaning of the original verb "do" in the original decision of the United States Supreme Court in the Feldman case to the new verb "do not" by the magistrate and district court judge either in an original report and recommendation by the magistrate or in a "de novo" decision by the district court judge to reverse in substance the original form and meaning of the United States Supreme Court's decision in the Feldman case, in order to defeat the subject-matter jurisdiction of the district court over the petitioner's case, mean that the district court lacks subject-matter jurisdiction over the petitioner's case within the meaning of Feldman?

3. During the pretrial stage of the present case and against the exceptions contained in the provisions of 28 U.S.C. § 636(b)(1)(A), can the respondents'

motion to dismiss the petitioner's case on the grounds of (1) failure to state a claim upon which relief can be granted, and (2) lack of subject-matter jurisdiction be assigned to the magistrate by the district court judge under the provisions of 28 U.S.C. § 636(b)(1)(B)?

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PETITION FOR WRIT OF CERTIORARI TO
The United States Court of Appeals
For the Sixth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Carmen R. Stanfield, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this case on August 24, 1989.

OPINIONS BELOW

The August 24, 1989, order of the United States Court of Appeals for the Sixth Circuit, whose decision is herein

sought to be reviewed, is appended as pages A-1 to 4. The prior January 9, 1989, court order of the United States District Court for the Middle District of Tennessee, Nashville Division, is appended as pages A-5 to 23. The prior September 30, 1988, Magistrate's Report and Recommendation of the United States District Court for the Middle District of Tennessee, Nashville Division, is appended as pages A-24 to 63.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on August 24, 1989. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rule 17.1(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While the pertinent verbal texts of the constitutional and statutory provisions involved are set forth as appendix pages A-70 to 73, due to their lengthiness, the following are the citations of the constitutional and statutory provisions involved in the present case: (1) United States Constitution, Art. III, Section 2, clause 2, (2) United States Constitution, Amendment XIV, (3) 42 U.S.C. § 1983, (4) 28 U.S.C. § 636(b)(1)(A), (5) 28 U.S.C. § 636(b)(1)(B), (6) Tennessee Supreme Court Rule 7, Art. 13, § 2(a), (7) Tennessee Supreme Court Rule 7, Art. 14, § 4, and (8) respondents' policies and practices.

STATEMENT OF THE CASE

Under Tennessee Code Annotated 23-1-103, appended as pages A-74 to 75, the

state legislature authorized the state supreme court to nonjudicially promulgate rules to examine bar candidates for the practice of law in Tennessee. Nonjudicially, the state supreme court promulgated Tennessee Supreme Court Rule 7 for a board of law examiners to examine bar candidates for the practice of law in Tennessee. Under § 13.02(a) of Tenn. Sup. Ct. R. 7, whenever the board alleges, as in the present case, that a bar examinee earned no passing test scores on the essay portion of the bar examination, (1) the bar examinee is automatically denied both the right to see his or her examination papers and the right to a hearing, and (2) the board itself is automatically denied the authority to provide either an informal hearing or a formal proceeding before the board for such a bar examinee. Under § 14.04 of Tenn.

Sup. Ct. R. 7, whenever the board alleges, as in the present case, that a bar examinee earned no passing test scores on the essay portion of the bar examination, the bar examinee is automatically required to pay additional money for reexamination.

In order to administer the provisions of §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7, the board nonjudicially prepared and followed the practices of (1) no review of examination papers, (2) no review of examination results, (3) no informal hearing, and (4) no formal proceeding in the matter of any bar examinee whom the board alleges, as in the present case, earned no passing test scores on the essay portion of the bar examination.

In a letter dated February 5, 1987, the petitioner's application to take the February, 1987, Tennessee bar examination

was approved by the board. The board not only informed the petitioner that the examination would be given on February 25 and 26, 1987, and that the quantified test scores would be reported on April 15, 1987, but also requested the petitioner to buy and bring papers on which to write the essay portion of the bar examination at the examination site. On February 25 and 26, 1987, the petitioner took the bar examination.

On April 11, 1987, the board held behind the petitioner's passing quantified test scores on the multistate portion and the essay portion of the bar examination and in an empty-worded letter, the board informed the petitioner that while the petitioner passed the multistate portion of the bar examination, the petitioner did not pass the essay portion of the bar examination.

In the letter of April 11, 1987, the board cited and enforced against the petitioner the provisions of §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7, as well as the board's practices in the administration of the aforementioned two sections of Tennessee Supreme Court Rule 7. Finally, in the same letter of April 11, 1987, the board offered to send the petitioner copies of the petitioner's examination papers on the essay portion upon the submission of a written request by the petitioner.

On April 14, 1987, the petitioner accepted the board's offer by submitting a written request for the examination papers to determine any material evidence of a failure on the essay portion of the bar examination. The board refused to send the examination papers. Again, on April 17, 1987, the petitioner in writing

requested the board to send the examination papers and also stated in the same letter that any further refusal to send the examination papers would leave the petitioner no choice but to sue in federal court.

The board still refused to send the examination papers and the petitioner filed a formal complaint with the United States Civil Rights Commission charging violation of the petitioner's civil rights by the board. The United States Civil Rights Commission referred the petitioner's complaint to the United States Department of Education which said that since it did not fund the activities of the board it could not act upon the petitioner's complaint.

Then, the board sent the petitioner an undated test score sheet showing that the petitioner passed the essay portion

of the bar examination, but the board still refused to release the petitioner's passing test scores for both the multi-state portion and essay portion of the bar examination.

Under (a) the Fourteenth Amendment of the United States Constitution, (b) 28 U.S.C. § 1331, (c) 28 U.S.C. § 1343(a)(3) and (4), (d) §§ 703(b) and 704(a) of Title VII--42 U.S.C. § 2000e, et. seq., and (e) 42 U.S.C. § 1983, the petitioner on February 25, 1988, sued the board, hereinafter referred to as the "respondents", in the United States District Court for the Middle District of Tennessee, Nashville Division, hereinafter referred to as the "district court", for the recovery of (a) the passing test scores the respondents defrauded the petitioner, (b) the $25 the respondents defrauded the petitioner, (c) $10 million

for compensatory damages, (d) $10 million for punitive damages and for the district court to declare §§ 13.02(a) and 14.04 of Tennessee Supreme Court Rule 7 unconstitutional under the United States Constitution. On March 17, 1988, the respondents moved the district court to dismiss the petitioner's case on the grounds of (a) failure to state a claim upon which relief can be granted and (b) lack of subject-matter jurisdiction. On March 23, 1988, the petitioner replied urging the district court to deny the respondents' motion to dismiss on the grounds that the petitioner's case contained claims upon which relief can be granted and the district court has subject-matter jurisdiction over the petitioner's case.

Although 28 U.S.C. § 636(b)(1)(A) prohibits the district court judge from doing so, the district court judge on

March 30, 1988, assigned the respondents' motion to dismiss to a magistrate to consider and determine the issues of (a) failure to state a claim upon which relief can be granted and (b) lack of subject-matter jurisdiction. Although Article III, § 2, clause 2, of the United States Constitution prohibits any judge of the lower federal courts from doing so, on September 30, 1988, the magistrate physically changed the original verb "do" into a new verb "do not" in the rule of law in the Feldman case and then used the meaning of the new verb "do not" to recommend that the district courts "do not" have subject-matter jurisdiction over the administration of state bar rules involving the respondents' arbitrary, capricious and fraudulent administration of test scores on the Tennessee bar examination. On December 1, 1988, the petitioner ob-

jected to the magistrate's report and recommendation urging the district court to overrule and reject it on the grounds that it violated the United States Constitution and statutes, substituted the petitioner's issues of fact and law with the speculative "view" of the magistrate - and incompatible cases, and it was without basis in fact and law.

On January 9, 1989, the district court judge not only held that "the magistrate's report is adopted and approved" but also ruled that the respondents acted in a "judicial capacity" within the meaning of Feldman when the respondents arbitrarily, capriciously and fraudulently held behind and hid from the petitioner passing test scores earned by the petitioner on the February, 1987, Tennessee bar examination, and accordingly, the district court judge granted the

respondents' motion to dismiss the petitioner's case. On January 18, 1989, the petitioner appealed the district court judge's court ruling and order of January 9, 1989, to the United States Sixth Circuit Court of Appeals, hereinafter referred to as the "6th circuit". On August 24, 1989, the 6th circuit affirmed the decision of the district court. The petitioner now prays the Supreme Court of the United States for a writ of certiorari.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Reason 1

An Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court

1.1. The first reason why the writ of certiorari should be granted consists of the need and necessity to make a judicial decision that legally separates mate-

rially and indisputably proved and provable test score fraud committed by state bar examiners against bar examinees in violation of the federally protected rights of bar examinees during the administration of bar examination test scores from (1) the meaning of administrative function within the scope of legal authority, (2) the meaning of judicial function within the scope of legal authority, and (3) the meaning of "final state court decision" within the scope of legal authority.

1.2. The 6th circuit erroneously affirmed the district court's decision that erroneously included test score fraud in the meaning of "final state court decision" and in effect, the decision of the 6th circuit erroneously sanctioned the inclusion of test score fraud in the meaning of "final state court decision" by the

failure of the 6th circuit to recognize and use as elements of the proper decision the fundamentally striking differences between the actions of the Committee on Admissions of the District of Columbia Bar in the Feldman case and the actions of the respondents in the present case that overwhelmingly weigh in favor of the exercise of subject-matter jurisdiction by the U.S. district court over the petitioner's case.

1.3. As regards the substance of the contact between Feldman and the Committee in the controlling facts of the Feldman case, Feldman initially requested the Committee for admission to the bar without the required examination. Without the presence of Feldman, the Committee denied Feldman's request. Feldman initiated a second contact with the Committee. The Committee granted Feldman an informal hearing, and again, the Committee denied

Feldman's request.

1.4. As regards the substance of the contact between Feldman and the D. C. Court of Appeals, Feldman initially petitioned the D. C. Court of Appeals for admission to the bar without the required examination. Subsequently, Feldman's counsel initially wrote the Chief Judge of the D. C. Court of Appeals a legal letter pleading for Feldman's admission to the bar without the required examination. The controlling facts of the Feldman case so summarized are quoted and hereto appended as pages A-76 to 78.

1.5. As regards the substance of the response of the D. C. Court of Appeals to the petitions submitted by Feldman and his counsel, the Chief Judge denied the petitions submitted by Feldman and his counsel and the D. C. Court of Appeals formally issued a per curiam order, deny-

ing Feldman admission to the bar without the required examination, which Feldman took to the U. S. District Court in the District of Columbia for review. The controlling facts of the Feldman case so summarized are quoted and appended hereto as pages A-76 to 78.

1.6. Unlike the controlling facts of the Feldman case, the respondents approved the petitioner's application to take the bar examination which required a minimum passing quantified test scores of 135 for the multistate portion and 7 for the essay portion. But the respondents defrauded the petitioner of the passing quantified test scores of eight (8) earned by the petitioner on the essay portion of the bar examination. After committing the test score fraud against the petitioner, the respondents initially and simultaneously informed the petitioner by correspondence

(1) that while the petitioner passed the multistate portion, the petitioner did not pass the essay portion, (2) that the petitioner had no legal right to petition the respondents for either an informal hearing or a formal proceeding, (3) that the respondents had no legal authority to grant either an informal hearing or a formal proceeding, and (4) that the respondents would send copies of the petitioner's papers on the essay portion upon written request by the petitioner.

1.7. Moreover, the Tenn. Sup. Ct. in compliance with the provisions of its own rules completely excluded itself from any indirect or direct involvement in the petitioner's test score fraud case against the respondents and the Tenn. Sup. Ct. never indirectly or directly made any judicial decision concerning the substance of the petitioner's test score fraud case

against the respondents. In effect, there has been a complete absence of any factual contact such as a formal legal letter, or a formal legal petition, or an informal hearing, or a formal proceeding between any judge or judges of the Tenn. Sup. Ct. and the petitioner. The controlling facts of the record of the present case so summarized are quoted and appended hereto as pages A-79 to 82.

1.8. Still, on April 14 and 17, 1987, the petitioner in writing accepted the respondents' offer by requesting the respondents to send copies of the petitioner's papers on the essay portion. The respondents have yet to reply the petitioner's request for copies of the petitioner's papers on the essay portion.

1.9. Unlike Feldman who took a per curiam order of the D. C. Court of Appeals to the U. S. District Court for review,

the petitioner in the present case not only had proved and provable evidence of 8 out of 12 correct answers earned by the petitioner and defrauded by the respondents, but also took the test score fraud committed by the respondents against the petitioner to the U. S. District Court for review.

1.10. The Richardson case is the most pertinent federal precedent case law that in part supports the petitioner's position in contesting the test score fraud case against the respondents. In the Richardson case, the board of law examiners certified to the state supreme court the names of bar examinees whom the board of law examiners decided that passed the bar examination and were qualified to practice law in the state, and the board of law examiners did not certify to the state supreme court the names of bar ex-

aminees whom the board of law examiners decided that did not pass the bar examination and were not qualified to practice law in the state. The state supreme court received from the board of law examiners the names of the certified candidates. But after the receipt of the names of the certified candidates by the state supreme court, the evidence consisting of the examination papers proved that one bar examinee who actually failed the bar examination was certified by the board of law examiners to the state supreme court for a license to practice law in the state, and one bar examinee who actually passed the bar examination was not certified to the state supreme court for a license to practice law.

1.11. The above decisions of the board of law examiners implied a twofold fraud. The first fraud was committed in

composing the names and the test scores of the candidates for certification, and the second fraud was committed in composing the names and the test scores of the candidates for rejection. The Richardson case fell in the latter instance of test score fraud, and federal subject-matter jurisdiction was exercised over the Richardson case by the U. S. District Court and the U. S. Court of Appeals for the 4th Ciruit.

1.12. As in the present case, when bar examiners commit illegal test score fraud against a bar examinee in violation of the bar examinee's federally protected rights, and the bar examinee claims the violation of his or her rights protected by federal laws, then, the bar examinee's claim raises a federal question over which federal courts have exercised subject-matter jurisdiction.

1.13. The U. S. Court of Appeals for the 9th Circuit laid down the basic elements which the bar examinee's claim must have for the exercise of federal subject-matter jurisdiction over the bar examinee's claim in these words:

> ". . .the applicant [must show that he or she] was prevented from passing through fraud, imposition or coercion by the board of examiners," Sutton v. Lionel, 585 F.2d 400, 402, Fn.2, (9th Cir. 1978), or "that the board of examiners' recommendation that he [or she] be denied admission was either arbitrary or capricious, or an abuse of discretion." Id., at 403.

1.14. The U. S. Supreme Court laid down the basic elements of the federal question the bar examinee's claim must have for the exercise of federal subject-matter jurisdiction over the bar examinee's claim in these words:

> "A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise

under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." Chief Justice John Marshall in Cohens v. Virginia, 6 Wheat. 264, 319, 19 U.S. 264, 379, 5 L.Ed. 257 (1821), which established the precedent for Osborn v. Bank of the United States, 9 Wheat. 738, 822, 22 U.S. 738, 822, 6 L.Ed. 204 (1824).

1.15. Unlike the Feldman case, not only was the petitioner deprived the right to petition the Tenn. Sup. Ct. either indirectly or directly, but also the Tenn. Sup. Ct. completely excluded itself from making any judicial decision on the petitioner's case. The pertinent provisions of §§ 14.01, 14.03, 13.02(a) and 14.04 are hereto appended as A-80 to 81.

1.16. Unlike the Feldman case, it was the counsel for the respondents who substituted or replaced the Tenn. Sup. Ct. which did not make any judicial decision in the petitioner's case with the respond-

ents who as a matter of fact committed test score fraud against the petitioner under color of §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7, together with the respondents' policies and practices in the administration of the aforementioned two sections of Tenn. Sup. Ct. R. 7 in violation of the petitioner's federally protected rights. The substitution is as follows:

> "It makes no difference in this case that the board rather than the Tennessee Supreme Court actually determined that the plaintiff had failed the bar examination. The board in administering the bar examination acts on behalf of and is supervised by the Tennessee Supreme Court, and the Court retains full authority to determine if a person should be licensed and admitted to practice as an attorney under T.C.A. § 23-1-104(b)." (Brief for the Appellees filed in the United States Court of Appeals for the Sixth Circuit, March, 1989, p. 15.)

Reason 2

A Principle of Federal Law in Conflict Among the Circuit Courts of Appeals

2.1. The second reason why the writ of certiorari should be granted consists of the need and necessity to settle the conflict between the decision of the U. S. Court of Appeals for the 6th Circuit in the present case, on the one hand, and the decision of the U. S. Court of Appeals for the 4th Circuit in the Richardson case, on the other hand, concerning the same principle of federal law controlling test score fraud committed by state bar examiners in bar examination cases.

2.2. The 6th circuit erroneously affirmed the decision of the district court in the present case that created a conflict between itself, on the one hand, and the decision of the 4th circuit in the Richardson case, on the other hand,

and in effect, the 6th circuit erroneously sanctioned the conflict between its decision in the present case and the decision of the 4th circuit in the Richardson case.

2.3. Just as the respondents in the present case have argued, in the Richardson case, one finds that the state bar examiners determined that the plaintiff had failed the bar examination and that the state bar examiners in administering the bar examination acted on behalf of and were supervised by the state supreme court and that the state supreme court retained full authority to determine if a person should be licensed and admitted to practice as an attorney in the state. But the 4th circuit not only exercised subject-matter jurisdiction over the Richardson case on the ground that test score fraud had been committed by the state bar examiners against the plaintiff in viola-

tion of the plaintiff's federally protected rights, but also granted relief to the plaintiff. As long as the decision of the 4th circuit in the Richardson case remains as a federal precedent case law, the decision of the 6th circuit in the present case cannot stand without sanctioning a nationwide conflict on the same principle of law concerning test score fraud committed by state bar examiners in bar examination cases.

2.4. The respondents argued that the fraudulent decision of the respondents in the present case is equivalent to a "final state court decision." In the Richardson case, the state bar examiners made the same fraudulent decision, but the 4th circuit did not regard that fraudulent decision made by the state bar examiners to be an equivalent of a judicial decision made by the state supreme court.

2.5. The respondents relied on the argument that regardless of the fact that the respondents committed test score fraud against the petitioner in violation of the petitioner's federally protected rights the test score fraud itself was a "final state court decision" with which the petitioner's constitutional challenges were intertwined, and therefore, the intertwinement barred federal subject-matter jurisdiction over the petitioner's case. In the Richardson case, the bar examiners did commit the same test score fraud and the plaintiff did make the same challenge, but the 4th circuit had no reason to see any final state court judicial decision intertwinement between the plaintiff's challenge and the state bar examiners' test score fraud because the latter, the test score fraud, was never a final state court decision.

2.6. The decision of the 4th circuit in the Richardson case is not without a rationale based upon federal precedent case law. The Prentis case provided the rationale. In the Prentis case, the U. S. Supreme Court drew a clear-cut distinction between judicial function and legislative function. The end result of the legislative function consists of rules either for the present or for the future, but in either case, the rules do not administer and enforce themselves. Rather, it requires administrators who are neither judges per se nor legislators per se to administer and enforce the rules within the scope of legal authority. Any violation of the rights of any citizen of the United States outside the scope of the legal authority to administer and enforce such rules is subject to review by the proper court. It was against the back-

ground of this rationale that the U. S. Supreme Court in the Feldman case cited the Prentis case and ruled that:

> ". . .federal courts do exercise jurisdiction over. . .constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules,. . ." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 485, 103 S.Ct. 1301, 1316, 75 L.Ed.2d 206 (1983) citing Doe v. Pringle, 550 F.2d 596, 597, (10th Cir. 1976); Hampton v. Tennessee Board of Law Examiners, No. 86-2476 (W.D. Tenn. 1986)(unpublished opinion). Pertinent sections of these three decisions are appended as pages A-67 to 69.

Reason 3

Principles of Federal Law in Conflict Between the Fourteenth Amendment of the United States Constitution and the decisions of the United States Supreme Court in the Schware case, the Slochower case and the Allgeyer case, on the one hand, and the decision of the United States Court of Appeals for the Sixth Circuit in the present case, on the other hand

3.1. The third reason why the writ of certiorari should be granted consists of the need and necessity to settle the conflict between the equal protection clause and the due process clause of the Fourteenth Amendment of the U. S. Constitution, Sutton v. Lionel, Richardson v. McFadden, Slochower v. Board of Education, and Allgeyer v. Louisiana, on the one hand, and (1) § 13.02(a) of Tenn. Sup. Ct. R. 7, (2) § 14.04 of Tenn. Sup. Ct. R. 7, (3) the respondents' policies and practices of (a) no review of examination

results, (b) no review of examination papers, (c) no informal hearing for any failure to pass the essay portion of the Tennessee bar examination and (d) no formal hearing for any failure to pass the essay portion of the Tennessee bar examination in the respondents' administration of §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7, on the other hand, concerning the same federal question on the same federal guarantees of equal protection of the law and due process of law.

3.2. The 6th circuit erroneously affirmed the decision of the district court in the present case that erroneously sanctioned a conflict between the federal Constitution and federal case law, on the one hand, and §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7 together with the respondents' policies and practices in the administration of the aforementioned

two sections of Tenn. Sup. Ct. R. 7, and in effect, the decision of the 6th circuit in the present case sanctioned the conflict between the federal Constitution and federal case law, on the one hand, and §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7.

3.3. All law school graduates who presented themselves not only to sit as bar candidates for "employment opportunities" as attorneys-at-law, but also to earn "employment" as attorneys-at-law in the State of Tennessee before, during and after their direct personal contacts with the respondents as required by Tenn. Sup. Ct. R. 7 shared in common both the citizenship of the United States and the State of Tennessee, or each shared in common the protection of both the laws of the United States and the State of Tennessee.

3.4. As admitted and shown by its own wordings, Tenn. Sup. Ct. R. 7, § 13.02(a), foresaw the fact, as in the present case, that the respondents in the administration of § 13.02(a) and § 14.04 of Tenn. Sup. Ct. R. 7, together with the respondents' policies and practices could injure any number of persons among the Tennessee bar candidates, including the petitioner, against whom the respondents were authorized to administer and enforce the aforementioned rule.

3.5. Based on this fact, the aforementioned rule granted in advance the right of petition for redress to some of the members of the same class of Tennessee bar candidates, citizens of the United States and the State of Tennessee, for injury committed against them by the respondents, but at the same time, the aforementioned rule denied in advance

some members of the same class of Tennessee bar candidates, also citizens of the United States and the State of Tennessee, the right to petition for redress for injury committed against them by the respondents. In so doing, § 13.02(a) of Tenn. Sup. Ct. R. 7 (a) discriminated against, (b) denied equal protection of the law, (c) denied procedural due process of law, and (d) denied substantive due process of law to some citizens of the United States and the State of Tennessee who were members of the same class of Tennessee bar candidates.

3.6. In the present case, the petitioner was a member of the February, 1987, class of Tennessee bar candidates consisting of about 100 persons in Nashville who were citizens of the United States and the State of Tennessee. While Tenn. Sup. Ct. R. 7, § 13.02(a), granted in advance some

aggrieved members of the February, 1987, class of Tennessee bar candidates the right to petition the respondents for redress for injury committed against them by the respondents, the aforementioned rule in advance discriminated against and denied the petitioner, an aggrieved member of the February, 1987, class of Tennessee bar candidates, the right to petition the respondents for redress for injury committed against the petitioner by the respondents. In so doing, the aforementioned rule denied the petitioner the right to equal protection of the law and due process of law. A deliberate, willful and intentional denial of the petitioner's right to equal protection of the law and due process of law was prohibited by the U. S. Constitution and federal case law as shown by the following authorities:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall. . .deprive any person of. . .liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV [1868].

". . .rules governing the admission to practice law. . .which provide that any applicant not recommended by the board of bar examiners may inspect his examination papers, questions given and ratings thereof and also permits any applicant to file a petition for judicial review within 60 days from the date the applicant has been notified that the board has recommended that he or she not be admitted, comply with due process requirements." Sutton v. Lionel, 585 F.2d 400, 401 (9th Cir. 1978).

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process and Equal Protection Clause of the Fourteenth Amendment. . ." Schware v. Board of Examiners,

353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957).

"The Liberty mentioned in the [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling;. . ." (Justice Peckham on the "liberty" guaranteed by the due process clause, Allgeyer v. Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 431, 41 L.Ed. 832 (1897).

3.7. According to the Black's Law Dictionary, "remedy" is

"The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. Long Leaf Lumber, Inc. v. Svolos, La. App., 258 So.2d 121, 124 (2d Cir. 1972). The means employed to enforce a right or redress an injury, as distinguished from right, which is a well founded and acknowledged claim. Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 38 S.Ct. 501, 503, 62 L.Ed. 1171 (1918)."

The application of the above cited definition to Tenn. Sup. Ct. R. 7, § 14.04, not only proves the aforementioned rule grossly faulty in terms of logic, law and fact, but also makes the aforementioned rule unconstitutional both on its face and in its enforcement against the petitioner.

3.8. The first main issue is: Why should there be a remedy where there was no hearing on the basis of the contested case principle to determine the violation of a right? The related issues are: Assuming that there was a hearing on the basis of the contested case principle, (a) what was the substantive nature of the right that was violated? (b) who violated such a right? (c) why did such a person violate such a right? (c) who was the owner of the right that was violated? and (e) who determines the required remedy for the violated right, the violator of the

right, or the owner of the violated right, or a neutral third party?

3.9. The second main issue through the fifth main issue are: Why should X offer a required remedy to Y for the violation of the right of Y before X has known the substantive facts of the obligation to do so? Where the substantive nature of the right of Y violated by X is the ideal that correspondingly requires the ideal remedy, why should X offer an inferior remedy to Y? Where X knows the substantive facts and accepts the obligation for the violation of the right of Y and agrees to offer Y the required remedy, why should X have Y to pay the cost of the required remedy to X? Why should Y whose personal actions did not directly or indirectly cause either the loss or the violation of any of Y's rights accept the obligation to pay to X the cost of the re-

quired remedy for X's violation of Y's right?

3.10. Falsely, Tenn. Sup. Ct. R. 7, § 14.04, assumes that the examiners are infallible, and the examinees are fallible. Factually, however, the examiners are human beings with inherently limited human faculties, and equally, the examinees are human beings with inherently limited human faculties. The examiners as human beings with inherently limited human faculties are naturally prone to err, as admitted by Tenn. Sup. Ct. R. 7, § 13.02(a), which requires some members of a single class of examinees to petition the examiners to correct their gross errors in judgment. Equally, the examinees as human beings with inherently limited human faculties are naturally prone to err.

3.11. Evidently, both the examiners

and the examinees are by nature fallible, and as such, in any joint activity such as an examination, an unsubstantiated allegation of a failure to pass an examination made by the examiners in relation to the examinees who challenged such an allegation is subject to a hearing on the basis of the contested case principle not only to determine whether the examiners or the examinees committed gross errors in judgment, but also in all cases where the examiners committed gross errors in judgment to determine whether it is legal to penalize the examinees for the errors of the examiners by requiring the examinees who in fact passed the first examination to repeatedly up to the cut-off number of times take the examination without success, thereby giving substance to the now commonplace saying in Tennessee that the first-time taker of the bar examination

has a better chance of passing than the second-time taker of the bar examination.

3.12. To do otherwise in the absence of contested and proven irrefutable facts is to make the administration of the Tennessee bar examination by the examiners not only a record-falsification, record-misrepresentation, fact-distortion, equivocation and monetary extortion scheme, but also a mere exercise by the examiners of arbitrary discretion, racism, sexism, discrimination, imposition, fraud, deception, arbitrariness, capriciousness, manifest unfairness and injustice in disguise deliberately, willfully and intentionally calculated to exclude examinees similarly situated as the petitioner in the present case in terms of race and sex from the lawful pursuit and attainment of "employment" as attorney-at-law in the State of Tennessee.

3.13. As admitted and shown by its own wordings, Tenn. Sup. Ct. R. 7, § 14.04 relative to Tennessee bar candidates, presumes a "failure to pass the bar examination" but since Tenn. Sup. Ct. R. 7, § 13.02(a) does not permit a Tennessee bar candidate, who allegedly fails to pass the bar examination, to know and rebut the substantive facts of an alleged "failure to pass the bar examination" no facts of an alleged "failure to pass the bar examination" exist within the knowledge of the Tennessee bar candidate, who allegedly fails to pass the bar examination; therefore, Tenn. Sup. Ct. R. 7, § 14.04, not only makes irrebutable the unsubstantiated presumption of an alleged "failure to pass the bar examination" and punishes the Tennessee bar candidate, who allegedly fails to pass the bar examination, for an undefined and unsubstantiated "failure to

pass the bar examination," but also, like Tenn. Sup. Ct. R. 7, § 13.02(a), deprives the Tennessee bar candidate, who allegedly fails to pass the bar examination, the right to procedural due process of law.

3.14. In so doing, like Tenn. Sup. Ct. R. 7, § 13.02(a), Tenn. Sup. Ct. R. 7, § 14.04, deprived the petitioner, an aggrieved member of the February, 1987, class of Tennessee bar candidates, of the right to procedural due process of law secured for and guaranteed the petitioner by the due process clause of the Fourteenth Amendment of the U. S. Constitution and the federal case law cited above at the end of paragraph 3.6.

3.15. Reexamination without due process of law was flatly rejected by Circuit Court Judge Craven in Richardson v. McFadden, 540 F.2d 744, 752 (4th Cir. 1976), when he stated that:

> "To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.
>
> "It is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great. We are not persuaded."

3.16. For the reasons stated above, not only are §§ 13.02(a) and 14.04 of Tenn. Sup. Ct. R. 7 unconstitutional, but also the respondents' policies and practices of (a) no review of examination results, (b) no review of examination papers, (c) no informal hearing, and (d) no formal hearing in the administration of the aforementioned two sections of Tenn. Sup. Ct. R. 7 are unconstitutional.

Reason 4

A Principle of Federal Law in Conflict Between the Decision of the United States Supreme Court in the Feldman case and the Decision of the United States Court of Appeals for the Sixth Circuit in the Present Case

4.1. The fourth reason why the writ of certiorari should be granted consists of the need and necessity to settle the conflict between (1) Article III, § 2, cl. 2, of the U. S. Constitution, (2) the Decision of the U. S. Supreme Court in the Feldman case, (3) the Decision of the U. S. Supreme Court in the Prentis case, (4) the decision of the 10th circuit in the Doe case, (5) the decision of the 4th circuit in the Richardson case and (6) the decision of the U. S. District Court for the Western District of Tennessee in the unreported Hampton case, on the one hand, and the decision of the 6th circuit affirming the decision of the

district court judge and magistrate of the U. S. District Court, on the other hand, concerning the same principle of federal law in bar examination cases.

4.2. The 6th circuit erroneously affirmed the decision of the district court that created a conflict between itself and the U. S. Constitution and federal precedent case law, and in effect, the decision of the 6th circuit created a conflict between itself and the U. S. Constitution and federal precedent case law.

4.3. The specific sections of (a) the U. S. Constitution, (b) the decisions of the U. S. Supreme Court in the Prentis case, and the Feldman case, (c) the decision in the unreported Hampton case, (d) the report and recommendation of the magistrate of the district court, (e) the ruling and order of the judge of the district court and (f) the decision of

the 6th circuit that are in question are as follows:

> "[2] . . .In all. . .other Cases. . ., the supreme Court shall have appellate Jurisdiction, both as to Law and Fact with such Exceptions, and under such Regulations as the Congress shall make." United States Constitution, Article III, § 2, cl. 2.
>
> ". . .Legislation. . .looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The. . .making of a rule for the future,. . . therefore is an act legislative not judicial." see Feldman, 460 U.S. at 477, 103 S.Ct. at 1312, citing Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908)(on legislative functions).
>
> "federal courts do exercise jurisdiction over. . .constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules." Feldman, 460 U.S. at 485, 103 S.Ct. at 1316, citing Doe v. Pringle, 550 F.2d at 597, (on challenges to administration of the rules).

". . .Federal courts do have jurisdiction over constitutional claims challenging the state's power to license attorneys or their rule-making authority or administration of the rules." Hampton, No. 86-2476, at 3, (on challenges to administration of the rules).

"'. . .Federal courts do not have jurisdiction over constitutional claims challenging the state's power to license attorneys or their rule-making authority or administration of the rules.'" The Magistrate's Report and Recommendation of September 30, 1988, p. 10.

". . .The Magistrate's Report is adopted and approved." United States District Court's Memorandum and Order of January 9, 1989, p. 10.

". . .The judgement of the district court is affirmed." United States Court of Appeals for the Sixth Circuit, Order of August 24, 1989, p.2.

4.4. The specific causation of the conflict is physically changing the original verb from "do" to "do not" in order to result in the use of erroneous facts to

substantiate the erroneous new meaning of the original principle of federal law. In recognition of the factual and legal differences between the legislative function performed by legislators within the scope of legal authority and the administrative function performed by administrators within the scope of legal authority, or in recognition of the fact that the rules which result from the performance of the legislative function by the legislators within the scope of legal authority require administrators to administer the rules within the scope of legal authority, the U. S. Supreme Court held in the Feldman case that federal courts do exercise jurisdiction over the administration of state rules beyond the scope of legal authority. But in the decision affirmed by the 6th circuit, the district court not only replaced the originally intended

meaning of administration of state rules with the unintended meaning of "judicial inquiry," but also equated the commission of test score fraud in the administration of state rules to a "final state court decision."

4.5. Neither a federal magistrate nor a federal judge of the inferior federal courts has the legal authority to physically change the original verb "do" into the verb "do not" in the original words of the U. S. Supreme Court's rule of law in the Feldman case purposefully to defeat the subject-matter jurisdiction of the district court over the petitioner's case.

4.6. The exercise of the appellate power of the U. S. Supreme Court means that in the federal judiciary only the U. S. Supreme Court has the power to change any or all of the original word-

ings of a rule of law in the Feldman case. The power of lower federal courts is limited to the interpretation and application of the rule of law in the Feldman case.

4.7. As shown by the magistrate's direct quotation, approved and adopted by the district court judge and then affirmed by the 6th circuit, physically changing the verb "do" into the verb "do not" in order to violate federal constitutional and statutory laws establishing the subject-matter jurisdiction of the federal district court is an unconstitutional and illegal act. This unconstitutional and illegal act was used to violate the constitutional and statutory subject-matter jurisdiction of the federal district court over the petitioner's case.

Reason 5

A Principle of Federal Law in Conflict Between 28 U.S.C. § 636(b)(1)(A) and the Smith Case, on the One Hand, and the Decision of the United States Court of Appeals for the Sixth Circuit in the Present Case, on the Other Hand

5.1. The fifth reason why the writ of certiorari should be granted consists of the need and necessity to settle the conflict between the decision of the 6th circuit in the present case and the provisions of 28 U.S.C. § 636(b)(1)(A), and the Smith case concerning the same federal question regarding motions to dismiss cases in federal district courts for "failure to state a claim upon which relief can be granted."

5.2. The 6th circuit erroneously cited the Smith case and the Roland case as legal authorities to support the decision of the district court in referring

to the magistrate under 28 U.S.C. § 636(b)(1)(B) the respondents' motion to dismiss the petitioner's case on the grounds of (1) "failure to state a claim upon which relief can be granted," and (2) lack of subject-matter jurisdiction.

5.3. As regards the controlling points of fact in the Smith case, Smith sued the Detroit Federation of Teachers (DFT) in U. S. District Court. The DFT filed a motion to dismiss Smith's case on the ground of "failure to state a claim upon which relief can be granted." The district court judge personally and initially heard oral arguments for and against the DFT's motion. At the end of the oral arguments, the district court judge personally and initially entered a final judgment in favor of the DFT. Smith appealed the district court's ruling to the 6th circuit, but the 6th circuit af-

firmed the district court's ruling. The controlling facts so summarized are hereto appended as pages A-83 to 84.

5.4. These facts conclusively proved two points. First, in recognition of the 28 U.S.C. § 636(b)(1)(A) exception contained in the DFT's motion for summary judgment, the district court judge did not refer the DFT's motion for summary judgment to a magistrate. And second, the action of the district court judge in the Smith case not only substantiated the intent of the provisions of 28 U.S.C. § 636(b)(1)(A), but also established a federal precedent case in the existence of which the decision of the 6th circuit cannot stand without creating a nationwide conflict that deserves to be settled by the U. S. Supreme Court.

5.5. The record of the Smith case shows that after the June 15, 1982, and

the August 30, 1983, decisions of the district court and the court of appeals, DFT filed a new motion for double costs. The record does not show that the new motion filed by the DFT for double costs contained any 28 U.S.C. § 636(b)(1)(A) exceptions. These facts conclusively proved that the DFT motion for double costs was a post-trial motion which did not contain any 28 U.S.C. § 636(b)(1)(A) exceptions.

5.6. Unlike the DFT's motion for double costs, in the present case, (1) the respondents' motion contains a 28 U.S.C. § 636(b)(1)(A) exception, (2) the district court judge heard no oral argument either for or against, (3) the parties did not consent for the case to be heard by a magistrate, (4) the district court judge referred the respondents' motion containing a 28 U.S.C. § 636(b)(1)(A) exception

to the magistrate under 28 U.S.C. § 636(b)(1)(B), (5) the district court judge approved and adopted the magistrate's report and recommendation to dismiss the petitioner's case, (b) the 6th circuit affirmed the district court's decision and created the conflict, and (7) the petitioner disagrees, in part, on the ground of the conflict between the Smith case and the 6th circuit's decision.

5.7. As regards the issue of "de novo" review, the district court judge was motivated, not to correct the conflict between the Smith case and his March 30, 1988, order, but rather to approve and adopt the magistrate's physical change of the verb "do" into the verb "do not" and thereby to substantiate the conflict. The district court judge's decision approving and adopting the magistrate's report and recommendation not only leaves

in tact the issue of the conflict between the Smith case and the March 30, 1988, order of the district court judge, but also created ten additional conflicts between the decision of the district court judge approving and adopting the magistrate's report and recommendation, on the one hand, and (1) the Feldman case, (2) the Doe case, (3) the Hampton case, (4) the Richardson case, (5) the Prentis case, (6) the Sutton case, (7) the Schware case, (8) the Allgeyer case, (9) the U. S. Constitution, Article III, § 2, cl. 2, and (10) the U. S. Constitution, Amendment XIV.

5.8. The Roland case arose out of the conditions of the confinement of prisoners. Roland, a prisoner, was raped by Weatherspoon, also a prisoner. Roland sued the prison authorities for failure to provide adequate safety measures for

him in the prison. With the consent of the parties, the case was assigned to the magistrate under 28 U.S.C. § 636(b)(1)(B) for a trial by jury.

5.9. Unlike the Roland case, the present case arose out of a test score fraud committed by the respondents against the petitioner in violation of the petitioner's federally protected rights. The parties did not agree for a magistrate to try the case. The respondents' motion containing a 28 U.S.C. § 636(b)(1)(A) exception was filed for a consideration and a decision by the district court judge.

5.10. Evidently, while by nature the entire Roland case may be assigned to a magistrate without violation of the provisions of 28 U.S.C. § 636(b)(1)(A), in the present case, by nature the respondents' motion containing a 28 U.S.C.

§ 636(b)(1)(A) exception cannot be assigned to a magistrate without the violation of the provisions of 28 U.S.C. § 636(b)(1)(A) and the federal case precedent established by the Smith case.

CONCLUSION

Throughout the United States, the federally protected rights of factually and legally qualified bar examinees would have no meaning in substance if in the complete absence of any informal hearing, or formal hearing, or formal proceeding, or judicial proceeding within the scope of legal authority by any court of law in the state the unlawful test score fraud committed by state bar examiners against bar examinees were accepted as a "final state court decision" simply because the state supreme court has the last supervisory control over the state bar examiners.

As in the present case, it would be extremely difficult, if not impossible, to substitute or to replace the state supreme court with the state bar examiners to cover-up unlawful test score fraud

without inevitably creating conflicts between existing federal constitutional, statutory and case laws which would dictate the need and necessity for the Supreme Court of the United States to settle the conflicts.

The grant of the writ of certiorari by the Supreme Court of the United States to settle the five conflicts set forth in the petitioner's petition for the writ of certiorari would provide an unprecedented legal relief for factually and legally qualified bar examinees who have evidence of proved and provable test score fraud committed against them by state bar examiners throughout the United States, but whose federally protected rights, among them, the right to sue in federal district courts, are denied in violation of the federal precedent case law established by the Richardson case resting

upon federal constitutional, statutory and case laws.

Therefore, the petitioner prays the Supreme Court of the United States to grant the writ of certiorari to settle the five conflicts set forth in this petition.

Respectfully submitted,

Carmen R. Stanfield, B.A., J.D.
For the Petitioner
P. O. Box 5688
Nashville, Tennessee 37208
(615) 327-1959

AFFIDAVIT OF SERVICE

State of Tennessee)
) SS:
County of Davidson)

I, Carmen R. Stanfield, depose and say that I am the petitioner in the foregoing case, and that on October 16, 1989, pursuant to Rule 28.5(c), Rules of the United States Supreme Court, I served three (3) copies of the foregoing "Petition for Writ of Certiorari," consisting of sixty-seven (67) pages, along with a 84-page appendix, on each of the parties required to be served herein as follows:

On Betty W. Horn, Charles W. Burson, Lowry F. Kline and H. Lee Barfield, II, the respondents herein, by mailing the three (3) copies in a duly addressed envelope, with first class postage prepaid, to William E. Young, counsel of

record for the aforementioned respondents, at the address of: Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025.

All parties required to be served have been served.

C. R. Stanfield

Carmen R. Stanfield

Subscribed and sworn to before me on October 16, 1989.

Commission Expires ... 11, 1990 Charles E. Mitchell

APPENDIX

APPENDIX

Page

A. Court Orders Sought to be Reviewed

1. August 24, 1989, order of the United States Court of Appeals for the Sixth Circuit. A-1

2. January 9, 1989, court order of the United States District Court for the Middle District of Tennessee, Nashville Division A-5

3. September 30, 1988, Magistrate's Report and Recommendation of the United States District Court for the Middle District of Tennessee, Nashville Division A-24
Hampton case attached. . . . A-53

4. Relevant Portions of Opinions

(a) Page 2 of the 08-24-89 Sixth Circuit Court of Appeals Order. A-64

(b) Page 10 of the 01-09-89 District Court Order . . A-65

(c) Page 10 of the 09-30-88 Magistrate's Report. . . A-66

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(d) Page 1316 of the Feldman case. A-67

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(f) Page 3 of the unreported Hampton case . . A-69

B. Constitutional and Statutory Provisions Involved

1. United States Constitution, Article III, § 2, cl. 2 . . . . . A-70

2. United States Constitution, Article XIV, § 1. . . A-70

3. The Civil Rights Redress Act, 42 U.S.C. § 1983 . . . A-71

4. The Temporary Assignment of Magistrates Act, 28 U.S.C. § 636(b)(1)(A) . . . A-71

5. The Temporary Assignment of Magistrates Act, 28 U.S.C. § 636(b)(1)(B) . . . A-71

6. Tennessee Supreme Court Rule 7, Article 13, Section 2(a). A-72

7. Tennessee Supreme Court Rule 7, Article 14, Section 4 . . . . . A-72

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8. "No Review of Examination Papers Policy". A-72

9. "No Review of Examination Results Policy" A-73

C. Other Tennessee State Statutory Provisions

1. Tennessee Code Annotated 23-1-103 on "Examination of Applicants". A-74

2. Tennessee Code Annotated 23-1-104 on "Certification and Admission of Successful Applicants". . . A-74

D. Controlling Facts

1. Feldman case. A-76

2. The Present case. A-79

(a) Tenn. Sup. Ct. R. 7, § 14.01 - Petition for Review. A-80

(b) Tenn. Sup. Ct. R. 7, § 14.03 - Exhaustion of Board Remedies . . . A-80

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(d) Tenn. Sup. Ct. R. 7, § 14.04 - No Review of Failure to Pass Bar . . A-81

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3. Smith case. A-83

No. 89-5087

United States Court of Appeals
For the Sixth Circuit

Carmen R. Stanfield, Plaintiff-Appellant,	)	Filed Aug 24, 1989
v.	)	Order
Betty W. Horn, Administrator, Board of Law Examiners of Tennessee; Charles W. Burson, President, Board of Law Examiners of Tennessee; Lowry F. Kline, Vice-President, Board of Law Examiners of Tennessee; H. Lee Barfield, II, Secretary-Treasurer, Board of Law Examiners of Tennessee, Defendants-Appellees.	)	

Before: Jones, Milburn and Nelson, Circuit Judges.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the 6th circuit. Upon examination of the briefs and record, this panel

unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Carmen R. Stanfield appeals the dismissal of her civil rights complaint filed under 42 U.S.C. § 1983 and § 2000e et seq., in which she alleges that because of her gender and race, officials of the board of law examiners of Tennessee fraudulently represented that she failed the Tennessee bar examination. Defendants moved to dismiss the complaint for, inter alia, lack of subject matter jurisdiction. The district court adopted the magistrate's recommendation for dismissal over plaintiff's objections.

Upon consideration, we conclude that the district court properly dismissed plaintiff's complaint for lack of jurisdiction. Generally, review of a state court's final judgment in a bar admission matter is not available in federal dis-

court. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476-86 (1983). Here, the district court correctly concluded that plaintiff seeks review of the decision in her individual case attributable to the Tennessee Supreme Court. Therefore, jurisdiction does not lie in the district court.

Also, we note that plaintiff's contention that defendant's [sic] motion to dismiss was improperly referred to the magistrate is without merit. Dispositive motions may be referred to the magistrate for a recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Roland v. Johnson, 856 F.2d 764, 768 (6th Cir. (1988). The district court conducted the required de novo review. See Roland, 856 F.2d at 769. Further, plaintiff did not object to the referral in her objections to the magistrate's report; she

thus waived appellate review of the claim. See Smith v. Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987).

Accordingly, the judgment of the district court is affirmed.

Rule 9(b)(5), Rules of the Sixth Circuit.

Entered by order of the court.

United States District Court
Middle District of Tennessee
Nashville Division

Carmen R. Stanfield	]	
	]	
v.	]	No. 3-88-0168
	]	Judge Higgins
Betty W. Horn, et al.	]	

Order

For the reasons set forth in the memorandum contemporaneously filed, the plaintiff's objections (filed December 1, 1988) to the magistrate's report and recommendation (filed September 30, 1988) are overruled. The magistrate's report is adopted and approved. Accordingly, the defendants' motion to dismiss (filed March 17, 1988) is granted and the plaintiff's complaint is dismissed.

It is so ordered.

/S/ Thomas A. Higgins
Thomas A. Higgins
United States District
Judge
1-9-89

United States District Court
Middle District of Tennessee
Nashville Division

Carmen R. Stanfield	]	
	]	No. 3-88-0168
v.	]	Judge Higgins
	]	
Betty W. Horn, et al.	]	

Memorandum

On February 25, 1988, the plaintiff, Carmen R. Stanfield, a black female, filed this action against the defendants, Betty W. Horn, administrator of the board of law examiners of Tennessee; Charles W. Burson, president of the board of law examiners of Tennessee; Lowry F. Kline, vice-president of the board of law examiners of Tennessee; and H. Lee Barfield, II, secretary of the board of law examiners of Tennessee, alleging that the defendants violated the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000 et seq., in their denial of her application for licensure to practice law, in violation of 42 U.S.C. § 1983. Stanfield challenges the supreme court rule which provides that the sole remedy affored an unsuccessful applicant on the bar examination is the right to reexamination. Stanfield also challenges the board's policy not to discuss or review with any applicant the responses and results of such applicant's examination. Accordingly, Stanfield seeks a declaratory judgment that Tennessee Supreme Court Rule 7, Article 13, Section 2 and Article 14, Section 4, which establish these policies are unconstitutional. In addition, Stanfield alleges that she provided nine (9) out of twelve (12) correct answers on the essay portion of the examination and 175 out of 200 correct answers on the multistate portion of the examina-

tion and seeks an order directing "the recovery of the plaintiff's test scores of nine (9) out of twelve (12) correct answers on the essay portion and 175 out of 200 correct answers on the multistate on the February, 1987, Tennessee bar examination" and "the certification and license of the plaintiff as an attorney-at-law in the state of Tennessee [board on the plaintiff's passing test scores on the February, 1987, Tennessee bar examination [sic]]." Stanfield seeks damages against the defendants in the amount of $20,000,025.00, including $10,00,025.00 in compensatory damages and $10,000,000.00 in punitive damages. Stanfield also seeks attorney's fees and costs.

On March 12, 1987, the defendants filed a motion to dismiss on the grounds that the court lacked subject matter

jurisdiction over the plaintiff's claims and that the plaintiff failed to state a claim for which relief could be granted.

By an order entered March 30, 1988, the defendants' motion to dismiss was referred to the magistrate pursuant to 28 U.S.C. § 636(b)(1)(B). On September 30, 1988, the magistrate filed his report and recommendation (report). The magistrate recommended that the defendants' motion to dismiss be granted and that the plaintiff's complaint be dismissed for lack of subject matter jurisdiction.

On October 17, 1988, the plaintiff filed objections to the magistrate's report. In an order entered November 18, 1988, the court found that the plaintiff's objections contained scandalous accusations against the magistrate and struck the plaintiff's objections. On December 1, 1988, the plaintiff refiled her objec-

tions after deleting the accusations against the magistrate.[1] On December 15, 1988, the defendants filed a response to the plaintiff's objections.

The court has reviewed the magistrate's report de novo as required by 28 U.S.C. § 636(b)(1)(C). For the reasons set forth below, the plaintiff's objections to the magistrate's report are overruled. The magistrate's report is adopted and the plaintiff's complaint is dismissed.

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[1] However, on the same date, the plaintiff filed "objections to the court's 'order and memorandum' of November 18, 1988." In her objections to the court's order, the plaintiff reasserts those arguments and accusations against the magistrate which the court found to be scandalous in its order of November 18, 1988. In the court's opinion, Stanfield's action in filing her "objections" to this court's order clearly borders on contempt.

I.

In considering a motion to dismiss, the court must accept as true all factual allegations in the complaint. Accordingly, the facts have been set forth as alleged in the plaintiff's complaint.

On February 25, 1987, Stanfield arrived at Tennessee State University to take the two-day Tennessee bar examination. On the first day, the multistate portion of the examination was administered, and on the second day the essay portion of the examination was administered. Stanfield alleges that on the first day of the examination, February 25, 1987, she was the first person in a line containing approximately ten (10) persons of the 229 people who took the February 1987 bar examination. Stanfield further alleges that a board employee, who had a list of the February 1987 applicants, de-

that Stanfield produce identification with her photograph, name, race and sex. According to Stanfield, this board employee:

> . . .carefully observed the plaintiff's name as Carmen R. Stanfield on the plaintiff's identification card, (c) carefully observed the plaintiff's face, color and sex on the plaintiff's identification card as a black and a female, (d) carefully compared the plaintiff's photo showing the plaintiff's race and sex as a black and a female with the plaintiff's physical appearance as a black and a female, (e) carefully noted the exactness between the plaintiff's photo showing the plaintiff's race and sex as a black and a female, (f) carefully compared the plaintiff's name on the plaintiff's identification card showing Carmen R. Stanfield with the plaintiff's name on the roster of Tennessee bar candidates showing Carmen R. Stanfield located among the names bearing the "S" series towards the end of the page (g) deliberately, willfully and intentionally decided and acted in a nervous, trembling

> and covering-up manner to mark, and did mark, some identification near the plaintiff's name noting the race and sex of the plaintiff which give the plaintiff not only reason to wonder at the nervous, trembling and weird behavior of the defendants in nervously covering-up and writing the identification mark which the defendants wrote near the plaintiff's name, but also reason to suspect that the defendants had some adverse ulterior motive against the plaintiff. . . .

By a letter dated April 11, 1987, the board of law examiners notified Stanfield that she was not successful on the February 25th and 26th bar examination. She was further informed that she would "be notified in writing of [her] essay grades by question and multistate scores by subject." The letter also informed Stanfield that "there is no provision. . . for review of examination papers by the applicant." Finally, Stanfield was advised of the date of the next bar ex-

amination. A notice of intent to retake the examination was included. By a memorandum dated April 11, 1987, Stanfield was informed that "upon written request addressed to the administrator, the board will furnish any unsuccessful applicant a photocopy of each of such applicant's essay examination which did not receive a passing grade." Stanfield was further informed that it was the practice of the board not to discuss or review with any applicant the result of any applicant's examination or the responses of an applicant to any essay question.

On April 14, 1987, Stanfield wrote to the board of law examiners and requested the board to produce documentary evidence that she had failed the bar examination. Stanfield also tendered a check for $25.00 with a signed note of intent to retake the bar examination.

On April 17, 1987, Stanfield filed a complaint with the board, alleging that the defendants violated her civil rights. Then, on April 23, 1987, Stanfield sent the board of law examiners notice of her intent to file a complaint with the United States Civil Rights Commission. On the same date, Stanfield filed a complaint with the United States Civil Rights Commission. The United States Civil Rights Commission forwarded Stanfield's complaint to the United States Department of Education. The Department of Education refused to investigate Stanfield's complaint.

By a letter dated April 22, 1987, the board of law examiners advised Stanfield that she passed eight (8) of the twelve (12) essay questions and 123 out of 200 questions on the multistate examination.[2]

Shortly thereafter, on April 29, 1987, Stanfield requested that the board return her $25.00 fee since the board failed to comply with her request to prove that she had not earned a passing test score on the bar examination.

Stanfield further contends that on May 13, 1987, the defendant Betty W. Horn informed her by letter that the board would increase her test scores from eight (8) to nine (9) correct answers on the essay portion "provided that the plaintiff without any objective evidence in advance agree that the plaintiff earned no passing scores on the multistate portion of the February, 1987, Tennessee Bar Examination." According to Stanfield, she declined Horn's offer and filed this action.

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[2]These scores are insufficient to pass the bar examination.

II.

The plaintiff objects to the magistrate's finding that the court lacks subject matter jurisdiction over the plaintiff's action and contends that the magistrate misinterpreted the law and its application to this action. The court has carefully reviewed the record and finds that the magistrate correctly interpreted the law and its application to this action.

The Supreme Court has recognized that there are two types of claims that are brought by unsuccessful bar applicants in the federal courts: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." D.C. Court of Ap-

peals v. Feldman, 460 U.S. 462, 485, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (quoting Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976). In Feldman, the Supreme Court held that the district courts have subject matter jurisdiction over the first type of claim--general challenges to state bar rules promulgated by state courts in nonjudicial proceedings--but do not have jurisdiction over the second type of claim--challenges to state court decisions in particular cases arising out of judicial proceeding. The Supreme Court emphasized that the district courts do not have jurisdiction over the second type of claim even if the complaint alleges that the state court's action was unconstitutional.

The courts have recognized that the distinction between claims about about state bar rules and claims that a state

court has unlawfully denied a particular applicant admission is often difficult to draw. Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984) cert. denied, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 1985). Nordgren v. Hafter, 789 F.2d 334 (5th Cir. 1986). Therefore, in Feldman, supra, the Supreme Court noted:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Feldman, 460 U.S. at 383-84, n. 16, 106 S.Ct. at 1315, n. 16, 5 L.Ed.2d 206, n.16.

Accordingly, in order to determine whether this court has subject matter

jurisdiction over this action, the court must determine whether Stanfield's claims present a general constitutional challenge to the bar admission rules or are "inextricably intertwined" with the board's denial of Stanfield's application for admission to the Tennessee bar.

The court recognizes that Stanfield challenges the constitutionality of Tennessee Supreme Court Rule 7, Article 13, Section 2[a] and Article 14, Section 4. However, in the court's view, the plaintiff's constitutional claim is inextricably intertwined with her challenge to the board's denial of her application for admission to the bar.

The plaintiff's primary contention is that she satisfactorily passed the Tennessee bar. Moreover, the primary relief the plaintiff requests is that the court grant the plaintiff a judgment

against the defendants "for recovery of the plaintiff's test scores on nine (9) out of twelve (12) correct answers on the essay and 175 out of 200 correct answers on the multistate portion of the February, 1987, Tennessee bar examination" and that the court grant the plaintiff a judgment against the defendants "for the certification and license of the plaintiff as an attorney-at-law in the state of Tennessee based on the plaintiff's passing test scores on the February, 1987, bar examination." Clearly, therefore, the primary thrust of the plaintiff's action is the board's denial of her application for admission to the bar.

The board, in administering the bar examination, acts on behalf of and is regulated by the Tennessee Supreme Court, and the court retains full authority to determine if a person should be licensed

and admitted to practice as an attorney. Tenn. Code Ann. §§ 23-1-103 and 23-1-104(b). Accordingly, in administering the court's rules by denying Stanfield admission to the bar for failure to pass the Tennessee bar examination as required, the board of law examiners acted in a judicial capacity within the meaning of Feldman, supra. Accordingly, Stanfield's claim is a challenge to a state court decision to deny her admission to the bar and is beyond this court's subject matter jurisdiction. Because Stanfield attacks the manner in which the state rules were applied to her application for admission to the bar, her remedy, if any, is only available through the Tennessee courts and then by appeal to the United States Supreme Court. Feldman, supra.

For the reasons set forth above, this action is beyond this court's sub-

ject matter jurisdiction and must be dismissed. Accordingly, the plaintiff's objections to the magistrate's report are overruled. The magistrate's report is adopted and approved and the defendants' motion to dismiss is granted.

An appropriate order will be entered.

/S/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
1-9-89

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Carmen R. Stanfield	)	Filed
	)	Sep. 30, 1988
Plaintiff	)	
	)	
v.	)	No. 3:88-0168
	)	Judge Higgins
Betty W. Horn, et al.	)	
	)	
Defendants.	)	
	)	

Report and Recommendation

I. Introduction

This case was referred to the magistrate pursuant to 28 U.S.C. § 636(b)(1)(B) by the honorable Thomas A. Higgins, district judge, by order dated March 29, 1988. The magistrate was directed to submit proposed findings of fact and recommendations for disposition of the defendants' motion to dismiss. (docket entery no. 4)

Plaintiff Carmen R. Stanfield (hereinafter "Stanfield") brings this

action under 42 U.S.C. § 1983 alleging that the defendants violated the due process and equal protection provisions of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, [sic][42] U.S.C. § 2000e et seq., in their denial of her application for licensure to practice law. The defendants are individual members of the Tennessee board of law examiners (hereinafter the "board"); Betty W. Horn, the board's administrator; Charles W. Burson, board president; Lowry F. Kline, the board's vice president; and H. Lee Barfield II, the board's secretary-treasurer. Stanfield is a 1986 law school graduate who was notified in April, 1987 by the board that she failed the Tennessee bar examination.

In essence, Stanfield challenges the Tennessee Supreme Court rule that provides that the sole remely afforded to an unsuc-

cessful applicant on the bar examination is the right to reexamine; and the board's practice not to discuss or review with any applicant the results of such applicant's examination or the responses thereto. Stanfield seeks a declaratory judgment that the Tennessee Supreme Court Rule 7, Article 13, Section 2(a) and Article 14, Section 4 that established this policy, is unconstitutional. Stanfield also seeks an order directing "the recovery of the plaintiff's test scores of nine (9) out of twelve (12) correct answers on the essay portion and 175 out of 200 correct anwers on the multistate on the February, 1987 Tennessee bar examination" and "the certification and license of the plaintiff as an attorney-at-law in the State of Tennessee based on the plaintiff's passing test scores on the February, 1987, Tennessee bar examination." Injunctive relief

is sought to "require the defendants to file such report as the court deems necessary to evaluate the defendants' compliance with the orders of this court" as well as attorneys' fees, costs, and disbursements pursuant to the Civil Rights Attorney's Fees Awards Act of 1976". (see docket entry no. 1, complaint ¶¶ 1-7, pp. 26-27.) Finally, Stanfield seeks damages against the defendants for $20,000,025.00 that includes $10,000,000.00 in compensatory civil damages and $10,000,000.00 in punitive civil damages.

The defendants moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, upon two grounds: (1) the lack of subject matter jurisdiction and (2) for failure to state a claim upon which relief can be granted. For the reasons stated hereinafter, the magis-

trate recommends that the court grant the defendants' motion to dismiss.

II. Analysis of Complaint*

On February 25, 1987, Stanfield arrived at Tennessee State University to take the Tennessee bar examination that is given in a two-day period. On the first day, the multistate portion of the examination was administered and on the second day, the essay examination was administered to Stanfield. On February 25, 1987, the first day of the examination, Stanfield states she was the first person in a line containing approximately ten (10) persons of 229 persons who took the February, 1987 bar examination.

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* As discussed infra, upon consideration of a motion to dismiss, the court must accept the factual allegations as correct.

Stanfield claims that she approached a member of the board who held the list containing the names of the February, 1987 bar candidates. The board member "demanded" that Stanfield produce identification revealing Stanfield's photo, name, race, and sex. According to Stanfield, the member:

> . . .carefully observed the plaintiff's name as Carmen R. Stanfield on the plaintiff's identification card, (c) carefully observed the plaintiff's face, color and sex on the plaintiff's identification card as a black and a female, (d) carefully compared the plaintiff's photo showing the plaintiff's race and sex as a black and a female with the plaintiff's physical appearance and a black female, (e) carefully noted the exactness between the plaintiff's photo showing the plaintiff's race and sex as a black and a female and the plaintiff's physical appearance showing the plaintiff's race and sex as a black and a female, (f) carefully compared the plaintiff's name on the plaintiff's iden-

> tification card showing Carmen R. Stanfield with the plaintiff's name on the roster containing the names of the February, 1987, class of Tennessee bar candidates showing Carmen R. Stanfield located among the names bearing the "S" series towards the end of the page, (g) deliberately, willfully and intentionally decided and acted in a nervous, trembling and covering-up manner to mark, and did mark, some identification near the plaintiff's name noting the race and sex of the plaintiff which gave the plaintiff not only reason to wonder at the nervous, trembling and weird behavior of the defendants in nervously covering-up and writing the identification mark which the defendants wrote near the plaintiff's name, but also reason to suspect that the defendants had some adverse ulterior motive against the plaintiff. . . .

Id. After receipt of her test scores on April 11, 1987, Stanfield states first that the board refused to allow a review of Stanfield's examination applying Tennessee Supreme Court Rule 7, Article 14, Section 4. On April 11, 1987, the

board notified Stanfield as to the results of her essay examinations that "[u]pon written request addressed to the administrator, the board will furnish to any unsuccessful applicant, a photocopy of each of such applicant's essay examination which did not receive a passing grade. (see docket entry no. 5, defendants brief in support of motion to dismiss, exhibit A.) Further, Stanfield was notified that it was the practice of the board not to discuss or review with any applicant the results of any applicant's examination or the responses of an applicant to any essay questions. Furthermore, Stanfield was advised that she "[would] be notified in writing of [her] essay grades by question and multistate scores by subject"; and that [t]here [was] no provision in the rule for review of examination papers by the applicant." Id.

Finally, Stanfield was advised of the date of the next bar examination. A notice of intent to retake the examination was included.

Stanfield alleges that the April 11, 1987 notice was deficient because it failed to enclose the essay [portion of the examination and also scores to mention her failure on the multistate portion of the examination][sic]. On April 14, 1987, Stanfield wrote the board requesting the board to produce documentary evidence that she had failed the February 25-26, 1987 bar examination. Stanfield also tendered a check for $25.00 with a signed notice of intent to retake the examination. (docket entry no. 1, appendix A.4.)

On April 17, 1987, Stanfield lodged another complaint with the board regarding alleged violation of her rights. Id. at

appendix A.9.

On April 23, 1987, Stanfield sent the board notice of her intent to file a complaint with the United States Civil Rights Commission. Id. at appendix A.18. On the same date, Stanfield filed a complaint with the United States Civil Rights Commission making essentially the same allegation as in this case, i.e., that the board had failed to present "irrefutable proof" that she had not passed the bar examination. Subsequently, the United States Civil Rights Commission forwarded Stanfield's complaint to the United States Department of Education. The Department of Education refused to investigate Stanfield's complaint.

On April 22, 1987, the board advised Stanfield that she passed eight (8) out of twelve (12) essay questions and 123 out of 200 correct questions on the multistate

portion of the examination. Shortly thereafter, on April 29, 1987, Stanfield requested that the board return her $25.00 fee since the board failed to comply with her request to prove that she earned no passing test scores in the February, 1987 bar examination. Id. at 20.

On May 13, 1987, Stanfield alleges Betty Horn informed her by written letter that the board would increase her test scores from eight (8) to nine (9) correct answers "provided that the plaintiff without any objective evidence in advance agree that plaintiff earned no passing scores on the multistate portion of the February, 1987 Tennessee bar examination." Stanfield declined the board's offer and filed her complaint on February 25, 1988.

Stanfield further contends that since the date that she took the bar examination and up to the date of this complaint, the

defendants through their enforcement of Tennessee Supreme Court Rule 7, Article 13, Section 2(a) and Tennessee Supreme Court Rule 7, Article 14, Section 4, have continued to commit against her "the acts of racism, sexism, discrimination, imposition, fraud, deception, arbitrariness, capriciousness, manifest unfairness and injustice." Stanfield alleges that this practice began when (1) the board employed an indentifying [sic] mark to note on the roster of applicants for the February, 1987 bar examination that she was black and female; and (2) when the board refused to discuss or review her examination with her.

Stanfield further states that as a result of the February 25, 1987 essay portion of the examination, "she could not fail to earn meritoriously. . .at least nine (9) out of twelve (12) correct

answers on the essay portion of the bar exam and on February 26, 1987, on the multistate portion, she earned at least 175 out of 200.

III. Conclusions of Law

The defendants move to dismiss this complaint under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the basis the court lacks subject matter jurisdiction and plaintiff fails to state a claim upon which relief can be granted. "A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be made at any time." 2A Moore's Federal Practice ¶ 12.07 [2.-1] "Once the existence of the subject matter jurisdiction is challenged, the burden of establishing it always rests on the party asserting jurisdiction. Id. However, "whenever it appears by suggestion of the parties or otherwise that the court lacks

subject matter jurisdiction, the court shall dismiss the action. Federal Rules of Civil Procedure 12(h)(3).

With respect to a Rule 12(b)(6) motion, as a general rule a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Myers v. United States, 636 F.2d 166, 168 (6th Cir. 1981). Further, as noted in Conley, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which [s]he bases [her] claim. [A]ll the Rule requires is a short and plain statement of the claim." Id. at 48.

In a word, the test under Rule

12(b)(6) is whether a claim has been adequately stated in the complaint. Nishiyama v. Dickson County, 814 F.2d 277, 279 (6th Cir. 1987). In considering a Rule 12(b)(6) motion, the court must accept as true, all factual allegations in the complaint; but not conclusory allegations. Id. at 279, citing Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983) cert. den. 469 U.S. 826 (1984). In determining if the allegations are sufficient, the court may look to the complaint and any amendments, and any documents or exhibits incorporated by reference in the complaint or its amendments. Goodman v. Bolden, 754 F.2d 1059 (2nd Cir. 1985).

As to the court's lack of subject matter jurisdiction, the Supreme Court has recognized there is a subtle but fundamental distinction in two types of

claims that are brought by unsuccessful state bar applicants in federal courts: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." D. C. Court of Appeals v. Feldman, 460 U.S. 462, 485 (1983) 103 S.Ct. 1303, 75 L.Ed.2d 206. As to the first type of claim:

> The United States district courts therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. [The

> second type of claim must be heard] "if at all, exclusively by the Supreme Court of the United States."

D.C. Court of Appeals v. Feldman, 460 U.S. at 462.

The distinction between claims about state bar rules and claims that a state court has unlawfully denied a particular applicant admission is often difficult to draw. Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984) cert. deni. ___ U.S. ___, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985). See also Nordgvea [sic] v. Hafter, 789 F.2d 334 (5th Cir. 1986). The Supreme Court, in distinguishing the two claims stated:

> "We have recognized that state supreme courts may act in a non-judicial capacity in promulgating rules regulating the bar. . . . Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state-court judgment in a judicial proceeding.

> Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the District Court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the District Court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States District Court review of final state-court judgments are not implicated. United States District Courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case."

Feldman, 460 U.S. at 485-86, 103 S.Ct. at 1316-17. (citations omitted) However, the Court observed that:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in

> essence being called upon to review the state court decision. This the district court may not do.

Feldman, 460 U.S. at 483-84, n. 16, 106 S.Ct. at 1315, n. 16.

Thus, jurisdictional scrutiny on Stanfield's claims must focus upon whether the issues Stanfield presents are a general constitutional challenge to bar admission rules and practices thereunder and or whether such challenge is "inextricably intertwined" with the board's decision to deny Stanfield's application for admission to the Tennessee bar. Feldman, 460 U.S. at 483, n. 16, 486-87, 103 S.Ct. at 1316, n. 16, 1316-1317.

Rule 7, Article 14, Section 4 provides that "[t]he only remedy afforded for a grievance for failure to pass the bar examination shall be the right to re-examination as herein provided." As

to re-examination, Rule 7, Article 13, Section 2(a) states that "[i]n case of failure on examination the board may, in its discretion, allow the applicant to take another examination upon the filing of the notice of intent."

Pursuant to these rules, "upon written request addressed to the administrator, the board will furnish to any unsuccessful applicant a photocopy of each of such applicant's essay examination answers which did not receive a passing grade." (see docket entry no. 5, exhibit B, attachment thereto.) Further, it is the practice of the board "[not to] discuss or review with any individual applicant the results of such applicant's examination or the responses of such applicant to any essay questions on the examination. Id.

Here, Stanfield's complaint in her

prayer for relief, requests that the court: (1) declare Tennessee Supreme Court Rule 7, Articles 13, 14, Sections 2(a) and 4 unconstitutional; (2) grant plaintiff a judgment against the defendants "for the recovery of the plaintiff's test scores on [sic] nine (9) out of twelve (12) correct answers on the essay and 175 out of 200 correct answers on the multistate portion on the February, 1987 Tennessee bar examination"; and (3) grant the plaintiff a judgment against the defendants "for the certification and license of the plaintiff as an attorney-at-law in the State of Tennessee based on the plaintiff's passing test scores on the February, 1987, bar examination."

In the magistrate's view, this action is clearly a challenge by Stanfield to a state court judicial proceeding resulting in the denial of her admission to

the Tennessee bar. Here, Stanfield's contentions are that she satisfactorily passed the Tennessee bar with the requisite answers required under the board's rules and that the board in its application of the rules exercises the Tennessee Supreme Court's admissions power. See Tenn. Code Ann. § 23-401 [sic](1980). To be sure, there is no evidence of the formal judicial proceedings, but the Supreme Court has instructed that "the form of the proceeding is not significant. It is nature and effect which is controlling." Feldman, 460 U.S. at 482. The board's administration of the rules, i.e., to deny Stanfield admission for failure to pass the Tennessee examination as required by the board's rule, is sufficient for the magistrate to conclude that the board acted in a judicial capacity within the meaning of Feldman. Thus, Stanfield's re-

quest for review of specific action as to her own application is beyond the district court's subject matter jurisdiction.

Arguably, the board's decision not to review or discuss Stanfield's examination or the responses in accordance with Rule 7, and in particular Article 13, Section 2a and Article 14, Section 4, present a constitutional claim. However, this challenge is likewise "inextricably intertwined" with the state court decision, Id. 460 U.S. at 486-87, because to resolve this issue, the court:

> "would have to go beyond mere review of the state rule as promulgated, to an examination of the rule as applied by the [board in administering the rules of the supreme court] to the particular factual circumstances of [Stanfield's case]. Federal courts do not have jurisdiction over constitutional claims challenging the state's power to license attorneys or their rule-making authority or administration of the rules."

Hampton v. Tennessee Board of Law Examiners, No. 86-2476 (W.D. Tenn. 1986) (affirmed Hampton v. Tennessee Board of Law Examiners, 819 F.2d 289 (6th Cir. 1987) unpublished opinion attached) citing Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976) cert. 431 U.S. 916 (1977).

Because Stanfield attacks the manner in which the state rules were applied to her bar application, her remedy, if any, must be through the Tennessee courts and then by direct appeal to the United States Supreme Court. Hampton, 819 F.2d at 289, citing Feldman, Doe v. Pringle. In a word, "plaintiff cannot invoke the jurisdiction of the federal courts by couching [her] claim for relief in terms of 42 U.C.S. §§ 1983, [1985], when she is seeking relief for denial of admission to the bar. Hampton v. Tennessee Board of Law Examiners, 819 F.2d 289 (6th Cir.

1987)(unpublished opinion, copy attached).

Finally, as to Stanfield's Title VII claim, Title VII does not apply because the Tennessee board of bar examiners is neither an employer, an employment agency, nor a labor organization within the meaning of the statute. 42 U.S.C.A. § 2000e. See also Tyler v. Vickery, 517 F.2d 1089, 1096 (5th Cir. 1975) cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).

IV. Recommendations

For the reasons stated previously, the magistrate recommends that the district court grant defendants' motion to dismiss for lack of subject matter jurisdiction. Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this report and recommendation in which to file any written objections to this recommendation,

with the district court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this report and recommendation can constitute a waiver of further appeal of this recommendation. Thomas v. Arn, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985).

Entered this the 30th day of September, 1988.

/S/ William J. Haynes, Jr.
William J. Haynes, Jr.
United States Magistrate

Level 1 - Group 1 - 1 of 1 Case

Linda A. Hampton and Rose O. Howard, Plaintiffs-Appellants, v. Tennessee Board of Law Examiners, Jointly and Severally: Katherine Darden, Wheeler Rosenbalm; Chaarles Burson; Valerius Sanford; Lewis Hagood; Joseph Tipton; Michael Whitaker; Rodney V. Ahles; Scott McGinness; Prince Chambliss; Ellen Vergos, and Other Unknown Examiners; Cecil C. Humphreys School of Law: Francis Sullivan; Daniel Wanat; Robert Banks; and Nancy Barron, Defendants-Appellees

No. 86-6057

United States Court of Appeals for the Sixth Circuit

819 F.2d 289: 1987 U.S. App. LEXIS 6658

May 22, 1987, Filed

Opinion:

Order:

Before: Keith and Norris, Circuit Judges; and Peck, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the parties' briefs this panel agrees unanimously that oral

argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiffs filed this civil action for declaratory, injunctive and monetary relief pursuant to 42 U.S.C. @@ [sic] 1983 and 1985 alleging constitutional violations in regard to their applications for admission to the state bar of Tennessee. The district court granted defendants' motion to dismiss. This appeal followed.

Plaintiffs have not alleged that a particular law or rule is unconstitutional but rather attack the manner in which the state rules were applied to their particular bar applications. For this their remedy, if any, 819 F.2d 289: 1987 U.S. App. LEXIS 6658 must be through the Tennessee courts and then by direct appeal to the United States Supreme Court. District of Columbia Court of Appeals v.

Feldman, 460 U.S. 462 (1983); Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 43 U.S. 916 (1977); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir.), cert. denied, 387 U.S. 935 (1967). Plaintiffs cannot invoke the jurisdiction of the federal courts merely by couching their claim for relief in terms of 42 U.S.C. @ [sic] 1983 when they are actually seeking relief for their denial of admission to the bar.

Accordingly, it is ordered that the judgment of the district court is affirmed. Rule 9(b)(5). Rules of the sixth circuit.

In the United States District Court
For the Western District of Tennessee
Western Division

Linda A. Hampton and Rose O. Howard,	)	Filed Sep. 23, 1986
Plaintiffs,	)	
vs.	)	No. 86-2476 GB
Tennessee Board of Law Examiners, et al,	)	
Defendants.	)	

Order of Dismissal

Plaintiffs allege violations of their due process and equal protection rights by defendants for plaintiffs' non-admission to the Tennessee bar. They seek relief under 42 U.S.C. §§ 1983 and 1985. Plaintiffs contend that they were denied admission to the bar because of, or in furtherance of, a conspiracy or conspiracies to admit bar applicants under an unspecified quota system.

Plaintiffs took the July 1985 bar examination and failed the essay portion.

Plaintiffs petitioned the defendant board of law examiners, seeking a hearing to ascertain the standards on which the exam was graded. The board denied plaintiffs' petition; however, plaintiffs were allegedly told informally that no standards were used but that the examination was of a competitive nature. This competition is what plaintiffs assert is a quota system. Plaintiffs petitioned the Tennessee Supreme Court for review of the board's procedures and policies. This petition was pending when plaintiffs took the February 1986 bar exam. Plaintiffs allege that during this second examination defendants intentionally memorized plaintiffs' examination numbers and intentionally failed plaintiffs. They further contend that the identification procedures for the examination were such that anonymity was lacking and that per-

sonal bias influenced whether a particular applicant failed or passed the examination. Plaintiffs claim that these actions on the part of the defendants deprived them of their due process and equal protection rights, violated Section 8 of the Tennessee Constitution and Tennessee Supreme Court Rule 7 and constituted fraudulent misrepresentation, defamation, outrageous conduct and intentional infliction of emotional distress.

Defendants move to dismiss the action for lack of subject matter jurisdiction under Fed.R.Civ.P. 12. Defendants contend that the federal court has no jurisdiction to entertain a cause of action based on non-admission to the state bar, unless plaintiff attacks the specific rules established by the state. For the following reasons, the court agrees and defendants' motion is granted.

Courts have recognized that there is a fundamental difference between a claim that a state has unlawfully denied a particular applicant or applicants admission to the bar, and a claim that the rules and regulations generally governing admission to its bar are unconstitutional. Delgado v. McTighe, 442 F.Supp. 725 (E.D. Pa. 1977). Federal courts have jurisdiction only where the constitutional validity of those rules is questioned, and not where the application of the rules to a specific person or persons is challenged. Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977). Federal courts do have jurisdiction over constitutional claims attacking states' power to license attorneys or their rule-making authority or administration of the rules. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976). Plaintiffs, however, are attacking the

application of the state rules to themselves, and are not attacking the constitutionality of the rules in general. For this reason, they fall into the category of cases where the proper avenue for complaints would be to petition the board of law examiners with a grievance, then appeal the board's decision to the Tennessee Supreme Court and then seek review of the Tennessee Supreme Court decision by petition for certiorari in the United States Supreme Court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Ktsanes, 552 F.2d 740; Pringle, 550 F.2d 596; Feldman v. Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Arvelo v. Supreme Court of Puerto Rico, 382 F.Supp. 510 (D.P.R. 1974). "Orders of a state court relating to the admission, discipline and disbarment of members of its

bar, may be reviewed only by the Supreme Court of the United States on certiorari to the state court and not by means of an original action in a lower federal court." MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969). The rule of review by the state courts and ultimately the United States Supreme Court applies even when a disgruntled bar applicant couches his federal court complaint in terms of a civil rights claim under 42 U.S.C. § 1983 rather than a request to review and reverse the state bar examiners' action. Pringle, 550 F.2d at 599; Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971).

Plaintiffs argue that, because they have already requested review of the board decision in the Tennessee Supreme Court and were denied review, they are without any avenue of appeal if they are not allowed to sue in federal district court.

This argument is without merit.

Plaintiffs' complaint indicates that plaintiffs never raised their claims of unconstitutional application of the state procedures before the board or before the Tennessee Supreme Court. Instead, plaintiffs' sole petition to the board and to the state supreme court requested simply a clarification of procedures used in grading. See Plaintiffs' Complaint ¶7-9. This petition was filed after their first exam. After board action on the request, the Tennessee Supreme Court denied certiorari. Plaintiffs did not seek review in the United States Supreme Court. No petition was filed before the board or any other state forum regarding the second exam, during which the unconstitutional actions allegedly occurred. Thus, the assertions about unconstitutional application of procedures have never been raised

in any state forum.

Plaintiffs' contention that there is no state forum in which their claims can be heard is apparently based in part on Tennessee Supreme Court Rule 7. That rule states in part: "Any person aggrieved by any action of the board may petition this court for a review thereof, as under the common law writ of certiorari." Tennessee Supreme Court Rule 7 § 14.01. The rule further provides that "[t]he only remedy afforded for a grievance for failure to pass the bar examination shall be right to re-examination as herein provided." Tennessee Supreme Court Rule 7 § 14.04. Plaintiffs indicate that the board denied their original petition because it solely challenged their failure of the examination. If their current grievance is also classified as "a grievance for failure to pass the bar

exam," over which review is prohibited under Rule 7, then they could not obtain the relief sought here in a state forum. Whether the board and the Tennessee Supreme Court would so categorize this complaint is uncertain, and a decision about whether review is barred depends on an interpretation of Rule 7. The proper interpretation of the rule however, is one that should be decided by the Tennessee courts and not by this court.

Plaintiffs further contend that their claim cannot be heard in state court because the Tennessee courts will not hear § 1983 actions. They cite Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), in support of this proposition. On June 30, 1986, the Tennessee Supreme Court overruled Chamberlain in Poling v. Goins, Supreme Court No. 227. In that case, the Supreme Court held that federal

courts do not have exclusive jurisdiction over § 1983 claims, and that Tennessee courts will hear those claims. This ruling defeats plaintiffs' claim that they will be left without a forum to hear the case.

Plaintiffs also contend that this court has subject matter jurisdiction because their complaint, in the alternative, alleges that Rule 7 is unconstitutional. However, liberally reading the complaint, this court does not find it to be a challenge to the constitutionality of the Rule. Rather, the allegation is that the Rule is unconstitutional as applied to plaintiffs. In this regard, this allegation is no different than the other allegations in the complaint, as far as jurisdiction is concerned.

In addition to their federal claims, plaintiffs allege several pendent state

claims including fraudulent misrepresentation, defamation, and intentional infliction of emotional distress. However, once the federal claims are dismissed, the federal district court has broad discretion whether or not to dismiss the pendent claims. See Moor v. County of Alameda, 411 U.S. 92 (1972), reh. denied, 412 U.S. 963, overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In this case the court sees no reason to exercise jurisdiction over the state claims.

The entire case is dismissed.

It is so ordered.

/S/ Julia Smith Gibbons
Julia Smith Gibbons
United States District Judge

September 23, 1986

Page 2 of the 08-24-89 Sixth Circuit Court of Appeals Order

No. 89-5087

United States Court of Appeals
For the Sixth Circuit

Carmen R. Stanfield,	)	Filed
	)	Aug. 24, 1989
Plaintiff-Appellant,	)	
	)	
v.	)	Order
	)	
Betty W. Horn, et al.	)	
	)	
Defendants-Appellees.	)	

Before: Jones, Milburn and Nelson, Circuit Judges.

. . . .Accordingly, the judgment of the district court is affirmed. . .

Entered by order of the court

United States District Court
Middle District of Tennessee
Nashville Division

Carmen R. Stanfield	)	Filed
	)	Jan. 9, 1989
v.	)	
	)	No. 3-88-0168
Betty W. Horn, et al.	)	Judge Higgins

. . . .The magistrate's report is adopted and approved. . .

/S/ Thomas A. Higgins
Thomas A. Higgins
United States District
Judge

In the United States District Court
For the Middle District of Tennessee
Nashville Division

Carmen R. Stanfield,	)	Filed
	)	Sep. 30, 1988
Plaintiff,	)	
	)	No. 3:88-0168
v.	)	Judge Higgins
	)	
Betty W. Horn, et al.,	)	
	)	
Defendants.	)	

Report and Recommendation

> ". . .Federal courts do not have jurisdiction over constitutional claims challenging the state's power to license attorneys or their rule-making authority or administration of the rules."

Hampton v. Tennessee Board of Law Examiners, No. 86-2476 (W.D. Tenn. 1986) (affirmed Hampton v. Tennessee Board of Law Examiners, 819 F.2d 289 (6th Cir. 1987) unpublished opinion attached) citing Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976) cert. 431 U.S. 916 (1977).

Page 1316 of the Feldman case

460 U.S. 462, 75 L.Ed.2d 206

District of Columbia Court of Appeals, et al., Petitioners

v.

Marc Feldman and Edward J. Hickey, Jr.

No. 81-1335.

Argued Dec. 8, 1982.
Decided March 23, 1983.

". . .federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . ." [citing Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976).

Page 597 of the Doe case

John Doe, Plaintiff-Appellant,

v.

E. E. Pringle, et al.,
Defendants-Appellees.

No. 75-1875.

United States Court of Appeals,
Tenth Circuit.

Argued and Submitted September 24, 1976.
Decided November 29, 1976.
Rehearing Denied December 27, 1976.

. . . .federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules [Keenan v. Board of Law Examiners of North Carolina, 317 F.Supp. 1350, (E.D.N.C. 1970); Goldsmith v. Pringle, 399 F.Supp. 620, (D. Colo. 1975); Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D.Mont. 1974),

. . . .

Page 3 of the Unreported Hampton case

In the United States District Court
For the Western District of Tennessee
Western Division

Linda A. Hampton and Rose O. Howard,	)	Filed Sep. 23, 1986
Plaintiffs,	)	
vs.	)	No. 86-2476 GB
Tennessee Board of Law Examiners, et al.,	)	
Defendants.	)	

Order of Dismissal

. . . .Federal courts do have jurisdiction over constitutional claims attacking states' power to license attorneys or their rule-making authority or administration of the rules. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976). . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent verbal texts of the constitutional and statutory provisions involved are as follows:

1. United States Constitution, Article III, Section 2, clause 2, states that:

> ". . .In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

2. United States Constitution, Amendment XIV, Section 1, states that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Civil Rights Redress Act, 42 U.S.C. § 1983 states that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 17 Stat. 13 (1971).

4. The Temporary Assignment of Magistrates Act, 28 U.S.C. § 636(b)(1)(A) states that:

> ". . .a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion. . .to dismiss for failure to state a claim upon which relief can be granted."

5. The Temporary Assignment of Magistrates Act, 28 U.S.C. § 636(b)(1)(B) states that:

". . .a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and submit to a judge of the court proposed findings of fact and recommendations for disposition, by a judge of the court, of any motion excepted in paragraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

6. Tennessee Supreme Court Rule 7,

Article 13, Section 2(a) states that:

"Any person who is aggrieved by any action of the board involving or arising from the enforcement of this Rule (other than failure to pass the bar examination) may petition the board for such relief as is within the jurisdiction of the board to grant."

7. Tennessee Supreme Court Rule 7,

Article 14, Section 4 states that:

"No Review of Failure to Pass Bar Examination. The only remedy afforded for a grievance for failure to pass the bar examination shall be the right to re-examination as herein provided."

8. The respondents' policy and practice

of "No Review of Examination Papers"

states that:

"There is no provision in the rule for review of examination papers by the applicant."

The respondents' policy and practice of "No Review of Examination Results" states that:

"It is the practice of the board that neither the members of the board nor any of the assistants will discuss or review with any individual applicant the results of such applicant's examination or the responses of such applicant to any essay questions on the examination."

STATEMENT OF THE CASE

Under Tennessee Code Annotated 23-1-103, the state legislature authorized the state supreme court to nonjudicially promulgate rules to examine bar candidates for the practice of law in Tennessee.

1. Tennessee Code Annotated 23-1-103 states that:

> "Examination of applicants. -- There shall be an examination of persons applying for license to practice as attorneys and counselors at law at the cities of Knoxville, Nashville, and Memphis, respectively, and at such other places and times as the [Tennessee] Supreme Court may direct. The [Tennessee] Supreme Court shall prescribe rules to regulate the admission of persons to practice law and providing for a uniform system of examinations, which shall govern and control admission to practice law, and to regulate such board in the performance of its duties."

2. Tennessee Code Annotated 23-1-104 states that:

"Certification and admission of

successful applicants. --(a) Such board shall certify to the [Tennessee] Supreme Court the names of all applicants who shall have passed the required examination, and who are determined by said board to be of full age, and of such reputation and character as to be likely to contribute to upholding the high standards of the legal profession. (b) Upon such certification, if the Supreme Court shall find that such person is of full age and good moral character, and otherwise qualified, it shall enter an order licensing and admitting him to practice as attorney, solicitor and counselor in all the courts of the state, which license if procured by fraud, may be revoked at any time within two (2) years."

CONTROLLING FACTS OF THE FELDMAN CASE

1.3. As regards the substance of the contact between Feldman and the Committee in the controlling facts of the Feldman case:

> "In November 1976, Feldman applied to the Committee on Admissions of the District of Columbia Bar for admission to the District Bar under a rule which, prior to its recent amendment, allowed a member of a bar in another jurisdiction to seek membership in the District Bar without examination. In January 1977, the Committee denied Feldman's application on the ground that he had not graduated from an approved law school. Initially, the Committee stated that waivers of Rule 46I(b)(3), or exceptions to it, were not authorized. Following further contact with the Committee, however, Feldman was granted an informal hearning. After the hearing, the Committee reaffirmed its denial of Feldman's application and stated that only the District of Columbia Court of Appeals could waive the requirement of graduation from an approved law school. Feldman, 460 U.S. at 466, 103 S.Ct. at 1306, 75 L.Ed.2d 206.

1.4. As regards the substance of the contact between Feldman, Feldman's counsel and the District of Columbia Court of Appeals:

> "In June 1977, Feldman submitted to the District of Columbia Court of Appeals a petition for admission to the bar without examination. Alternatively, Feldman requested that he be allowed to sit for the bar examination. . . .The District of Columbia Court of Appeals did not act on Feldman's petition for several months. In March 1978, Feldman's counsel wrote to the Chief Judge of the District of Columbia Court of Appeals to urge favorable action on Feldman's petition." Feldman, 460 U.S. 466, 103 S.Ct. 1306, 75 L.Ed.2d 206.

1.5. As regards the substance of the response of the D. C. Court of Appeals to the petitions submitted by Feldman and his counsel, the Chief Judge denied the petitions submitted by Feldman and his counsel:

> "In late March 1978, the Chief Judge of the District of

Columbia Court of Appeals responded to the letter from Feldman's counsel. . . .On March 30, 1978, the District of Columbia Court of Appeals issued a per curiam order denying Feldman's petition." Feldman, 460 U.S. at 468, 103 S.Ct. at 1307, 75 L.Ed.2d 206.

CONTROLLING FACTS OF THE PRESENT CASE

1.6. Unlike the controlling facts of the Feldman case, the respondents approved the petitioner's application to take the bar examination as shown by the following contents of the respondents' letter of February 5, 1987:

> ". . .you have been approved to take the Tennessee Bar Examination to be given on February 25 and 26, 1987."

The allegation of failure on the essay portion is shown by the following subject heading of the respondents' April 11, 1987, letter:

> "TO: Tennessee Bar Examination Unsuccessful Applicants
> RE: Statement of Practice Regarding Results of Essay Examination"

But after the petitioner filed a formal complaint with the United States Commission on Civil Rights, irrefutable material evidence proved that the petitioner

successfully passed the essay portion of the bar examination which required a passing quantified test score of 7. The contents of the material evidence on the petitioner's passing essay test score is as follows:

> "Total Number of Passing Essay Scores: 8 "

1.7. Moreover, the Tennessee Supreme Court in compliance with the provisions of its own rules completely excluded itself from any indirect or direct involvement in the petitioner's test score fraud case against the respondents as shown by the following sections of Tennessee Supreme Court Rule 7.

> "14.01. Petition for Review. Any person aggrieved by any action of the board may petition this court for a review thereof, as under the common law writ of certiorari."

> "14.03. Exhaustion of Board Remedies. The court will enter-

tain no application or petition from any person who may be effected [sic] directly or indirectly by this rule, unless that person has first exhausted his remedy before the board."

"13.02(a). Petitions to Board. Any person who is aggrieved by any action of the board involving or arising from the enforcement of this rule (other than failure to pass the bar examination) may petition the board for such relief as is within the jurisdiction of the board to grant."

"14.04. No Review of Failure to Pass Bar Examination. The only remedy afforded for a grievance for failure to pass the bar examination shall be the right to re-examination as herein provided."

The Tennessee Supreme Court never indirectly or directly made any judicial decision concerning the substance of the petitioner's test score fraud case against the respondents as shown by the follwing statement made on page 9 of the magistrate's September 30, 1988, report:

". . .To be sure, there is no evidence of the formal judicial proceedings,. . ."

CONTROLLING FACTS OF THE SMITH CASE

5.3. As regards the controlling points of fact in the Smith case:

> "Detroit Federation of Teachers (DFT) filed a motion to dismiss or for summary judgment on February 9, 1981, alleging that Smith had failed to state a claim upon which relief could be granted and that the district court lacked jurisdiction to hear Smith's case. Smith then filed a motion with the court for leave to amend the complaint to substitute a section 1983 claim against the Union for the state tort claim. Oral argument was heard before the district court on March 31, 1981. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1372 (6th Cir. 1987).
>
> ". . .The district court agreed with DFT in a bench opinion entered following the hearing. The court formalized its holding in an order denying Smith's motion to amend its complaint because the proposed amendment would be 'futile," and granting DFT's motion to dismiss the complaint and for summary judgment. Following the district court's grant of summary judgment to

the board on June 1, 1982, final judgment was entered dismissing Smith's case on June 15, 1982, but assessing no costs. Smith then appealed to this court.

In an unpublished decision, we affirmed the district court in its entirety on August 30, 1983. Id.

"DFT's subsequent motion for attorney's fees in the district court was referred to a magistrate for a report and recommendation." Id.